

UNITED STATES OF AMERICA

v.

Manning, Bradley E.
PFC, U.S. Army,
HHC, U.S. Army Garrison,
Joint Base Myer-Henderson Hall
Fort Myer, Virginia 22211

Prosecution Response

**to Defense Request for Partial
Reconsideration of Discovery Ruling**

17 April 2012

RELIEF SOUGHT

The prosecution respectfully requests that the Court deny Defense Request for Partial Reconsideration of Discovery Ruling (hereinafter the “Defense Motion”) because the rules of discovery do not support the defense’s request for either the production of all grand jury proceedings in relation to the accused or WikiLeaks, or for *in camera* review of such materials under the standard set forth in Rule for Courts-Martial (RCM) 701(a)(2).

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the Defense bears the burden of persuasion and must prove any factual issues necessary to decide this motion by a preponderance of the evidence. See Manual for Courts-Martial, United States, Rule for Courts-Martial (R.C.M.) 905(c) (2008).

FACTS

The Army Criminal Investigation Command (CID), Federal Bureau of Investigation (FBI), and Diplomatic Security Service (DSS) are the only law enforcement authorities that participated in the joint investigation of the accused.

The FBI is a subordinate organization to the Department of Justice (DOJ). The FBI and DOJ are not Department of Defense (DOD) agencies operating under Title 10 status or subject to a military command.

The FBI files relating to the accused and WikiLeaks are classified. The DOJ files relating to the accused and WikiLeaks are, at a minimum, law enforcement sensitive and contain grand jury information. The prosecution has no authority to produce any FBI or DOJ files which have not already been produced to the defense.

On 23 March 2012, the Court ordered that the prosecution has a due diligence obligation to search, *inter alia*, the FBI files relevant to this case and to disclose to the defense that which is discoverable under RCM 701(a)(6) and Brady.¹ See Enclosure 1.

¹ For purposes of this Response, Brady includes its progeny.

WITNESSES/EVIDENCE

The prosecution does not request any witnesses be produced for this motion. The prosecution requests that the Court consider the following enclosures to this motion in its ruling.

1. Ruling: Defense Motion to Compel Discovery, 23 March 2012 (Appellate Exhibit XXXVI).
2. Attachment F to Defense Motion to Compel Discovery, 16 February 2012 (Appellate Exhibit VIII).
3. Section V of Prosecution Supplement to Prosecution Proposed Case Calendar, 8 March 2012 (Appellate Exhibit XII).
4. Memorandum, *Task Force to Review Unauthorized Disclosure of Classified Information (FOUO)*, Secretary of Defense Robert Gates, 4 August 2010.

LEGAL AUTHORITY AND ARGUMENT

The prosecution requests that the Court deny the Defense Motion because the rules of discovery do not support the defense's request for either the production of all grand jury proceedings in relation to the accused or WikiLeaks or an *in camera* review of such materials under the standard set forth in RCM 701(a)(2).

I: RCM 701(a)(6) AND BRADY GOVERN DISCOVERY OF THE REQUESTED GRAND JURY MATERIALS.

On 23 March 2012, the Court ordered that the prosecution bears an obligation to search for, and disclose, information within the FBI file that is discoverable under RCM 701(a)(6) and Brady. See Enclosure 1, page 12 ("the Government will examine [the FBI files] for evidence that is favorable to the accused and material to either guilt or punishment").

RCM 701(a)(6) provides that the prosecution shall, as soon as practicable, disclose that which reasonably tends to negate guilt, reduce the degree of guilt, or reduce punishment. See RCM 701(a)(6). RCM 701(a)(6) implements the Supreme Court's decision in Brady. See Williams, 50 M.J. at 441; see also Brady v. Maryland, 373 U.S. 83, 87 (1963) (the prosecution shall disclose evidence favorable to the accused that is material to guilt or punishment). The prosecution bears an obligation to disclose to the defense any grand jury materials that are discoverable under these rules.

RCM 701(a)(2) provides that, upon defense request, the prosecution shall permit the defense to inspect materials "within the possession, custody, or control of military authorities" which are material to the preparation of the defense. See RCM 701(a)(2). The FBI is a subordinate organization to the DOJ, and neither organization is a DOD agency operating under Title 10 status or subject to a military command. Thus, the FBI and DOJ files are not within the possession, custody, or control of military authorities. RCM 701(a)(2) does not govern discovery of such files, to include any grand jury materials contained therein. Grand jury materials are only discoverable under RCM 701(a)(6) and Brady. This is consistent with the existing Order. See Enclosure 1.

The defense's request for the prosecution to produce the entire grand jury proceedings to the defense is not supported by any rule of discovery or production. See RCM 701(a)(6); see also Brady, 373 U.S. at 87; see also RCM 703(f) (relevant and necessary standard).

The defense's request for *in camera* review of such materials under the standard set forth in RCM 701(a)(2) is without legal merit. The prosecution continues its search of the FBI file for discoverable information under RCM 701(a)(6) and Brady, the applicable rules of discovery for material outside military authorities.

II: THE PROSECUTION SUPPLEMENTS ITS RESPONSE TO THE DEFENSE MOTION WITH THE FOLLOWING METHODOLOGY RELATING TO OTHER GOVERNMENT ORGANIZATIONS.

In light of the numerous government organizations involved and to cure any confusion or inconsistencies between the existing Court Order and the Defense Motion, the prosecution proffers which materials should be subject to discovery under RCM 701(a)(2), which files of government organizations the prosecution bears an obligation to search under Williams, and which files of organizations the prosecution has an ethical obligation to search.

A. The Discovery Standard under RCM 701(a)(2) Applies to Files within the Possession, Custody, or Control of Military Authorities For Which the Defense has Submitted a Specific Request.

Information within the possession, custody, or control of military authorities and specifically requested by the defense is discoverable, if material to the preparation of the defense. See RCM 701(a)(2). A specific request must provide "the prosecutor notice of exactly what the defense desires[.]" See United States v. Eshalomi, 23 MJ 12, 22 (CMA 1986) (citing United States v. Agurs, 427 U.S. 97, 106 (1976)). The prosecution proffers that DOD agencies operating under Title 10 status or subject to a military command are "military authorities" under RCM 701(a)(2). Thus, beyond the prosecution's own files and based on existing defense requests, only the *specifically-requested files* of the following government organizations are subject to review under RCM 701(a)(2) for discovery purposes:

(1) **Army Criminal Investigation Command (CID)**. The primary law enforcement organization within the Department of the Army focused on investigating the accused.

(2) **Defense Intelligence Agency (DIA)**. An intelligence agency within the DOD which operated the Information Review Task Force (IRTF), a DOD directed organization that "[led] a comprehensive [DOD] review of classified documents posted to the WikiLeaks website [...], and any other associated materials." See Enclosure 4.

The discovery standard under RCM 701(a)(2) does not apply to the files of other DOD agencies operating under Title 10 status or subject to a military command because the defense has not made a specific request for any such files.

B. The Court of Appeals for the Armed Forces in Williams Outlined the Scope of the Prosecution's Duty to Search for Discoverable Information.

The prosecution shall search the following files for discoverable information: (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity. See Williams, 50 M.J. at 441. The prosecution proffers that, based on the date of this response, it shall search the files of the following government organizations for discoverable information under each prong of Williams.

Law Enforcement Authorities

The only law enforcement authorities that participated in the joint investigation of the accused are as follows:

(1) **CID**. The primary law enforcement organization within the Department of the Army focused on investigating the accused.

(2) **FBI**. The primary law enforcement organization within the DOJ, focused on investigating matters related to the accused.

(3) **Diplomatic Security Service (DSS)**. The primary law enforcement organization within the Department of State (DOS), focused on investigating matters related to the DOS.

Closely Aligned Organizations

In addition to those above organizations, the prosecution proffers that only the following government organizations qualify as entities closely aligned with the prosecution:

(1) **DOS**. The accused is charged with compromising the DOS's documents and the prosecution intends to use additional information from the Department during its case-in-chief.

(2) **Government Agency**. The accused is charged with compromising this Government Agency's documents and the prosecution intends to use additional information from the Agency during its case-in-chief.

(3) **Office of the Director of National Intelligence (ODNI)**.² The prosecution intends to use information from this Department during its case-in-chief.

(4) **DOJ**. The prosecution collaborated with the federal prosecutors within the DOJ during the accused's investigation.³

² The prosecution is only referring to the ODNI proper, and not its subordinate organizations.

(5) **DIA.**⁴ The prosecution intends to use information from this Agency during its case-in-chief.

(6) **Defense Information Systems Agency (DISA).**⁵ The prosecution intends to use information from the Agency during its case-in-chief.

(7) **United States Central Command (CENTCOM).**⁶ The accused is charged with compromising the CENTCOM's documents and the prosecution intends to use additional information from the command during its case-in-chief.

(8) **United States Southern Command (SOUTHCOM).**⁷ The accused is charged with compromising the SOUTHCOM's documents and the prosecution intends to use additional information from the command during its case-in-chief.

Specific Requests

In addition to those above organizations and their related Williams category, the prosecution proffers that the defense submitted a request for a *specified type* of information only within the **Office of the National Counterintelligence Executive (ONCIX)**.⁸

C. In addition to the Search Requirements under Williams, the Prosecution has Sought Additional Information that it Believes to be Brady Material under its General Due Diligence Requirement.

In addition to the prosecution's discovery requirements under RCM 701(a)(2), RCM 701(a)(6), and Williams, the prosecution has an ethical obligation to search for potential Brady material that the prosecution has a good faith basis may exist in certain entities. See U.S. Dep't of Army, Reg. 27-26, Rules of Professional Conduct for Lawyers R. 1.1, R. 1.3, R. 3.8(d) (1 May

³ The prosecution is only referring to Main Justice and the District Prosecution Offices, and not its subordinate organizations.

⁴ This agency also falls within military authorities, pursuant to RCM 701(a)(2).

⁵ Id.

⁶ Id.

⁷ Id.

⁸ The prosecution and ONCIX are not closely aligned because they do not share a close working relationship. The prosecution's relationship with ONCIX is limited to the organization's review of certain classified information. The prosecution does not presently request reconsideration of the Court's Order dated 23 March 2012, where the Court identified ONCIX as being closely aligned with the prosecution, because the prosecution already bears an obligation to search the files of ONCIX based on a specific defense request.

1992) (AR 27-26). The prosecution has a good faith basis that the following government entities (not closely aligned with the prosecution) possess material that *could* be discoverable under RCM 701(a)(6) or Brady, and are not subject to a defense specific requests:

- (1) **Government Agency.**
- (2) **United States Cyber Command.**⁹
- (3) **More than Fifty Government Organizations with Limited Involvement.**

CONCLUSION

The prosecution respectfully requests that the Court deny the Defense Motion because the rules of discovery do not support the defense's request for either the production of all grand jury proceedings in relation to the accused or WikiLeaks or an *in camera* review under the standard set forth in RCM 701(a)(2).



ASHDEN FEIN
MAJ, JA
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 17 April 2012.



ASHDEN FEIN
MAJ, JA
Trial Counsel

⁹ This agency also falls within military authorities, pursuant to RCM 701(a)(2).

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17 April 2012

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SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

AUG 5 2010

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
DIRECTOR, COST ASSESSMENT AND PROGRAM
EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

Subject: Task Force to Review Unauthorized Disclosure of Classified Information (FOUO)

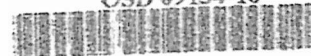
(U//FOUO) On July 28, 2010, I directed the Director, Defense Intelligence Agency (DIA) to establish an Information Review Task Force (IRTF) to lead a comprehensive Department of Defense (DoD) review of classified documents posted to the WikiLeaks website (www.wikileaks.org) on July 25, 2010, and any other associated materials. Department of Defense Components should provide DIA any assistance required to ensure the timely completion of the review.

(U//FOUO) The IRTF will review the impact of the unauthorized disclosure of classified information specified above. The IRTF will coordinate throughout the Intelligence Community in conducting this time-sensitive review and integrate its efforts with those of the National Counterintelligence Executive.

(U//FOUO) The IRTF will provide regular updates to the Office of the Secretary of Defense (OSD) on its findings. A more comprehensive interim report will be provided as the effort progresses. That report will include the following items:

- (U//FOUO) Any released information with immediate force protection implications;
- (U//FOUO) Any released information concerning allies or coalition partners that may negatively impact foreign policy;
- (U//FOUO) Any military plans;

OSD 09134-10



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- (U//FOUO) Any intelligence reporting;
- (U//FOUO) Any released information concerning intelligence sources or methods;
- (U//FOUO) Any information on civilian casualties not previously released;
- (U//FOUO) Any derogatory comments regarding Afghan culture or Islam; and
- (U//FOUO) Any related data that may have also have been released to WikiLeaks, but not posted.

A final report will be produced once all documents are assessed.

(U//FOUO) The RTF is the single DoD organization with authority and responsibility to conduct the DoD review regarding this unauthorized disclosure. By separate tasking, I am directing USD(I) to conduct an assessment of the Department's procedures for accessing and transporting classified information.

(U//FOUO) This review is separate from, and unrelated to, any criminal investigation of the leaked information. The assessment and review of the leaked documents is not intended to, and shall not limit in any way, the ability of Department, Federal Bureau of Investigation or any other federal criminal investigators, trial counsel and prosecutors to conduct investigative and trial proceedings in support of possible prosecutions under the Uniform Code of Military Justice or federal criminal provisions.



cc:
Director of National Intelligence
Director, Central Intelligence Agency
Assistant Secretary of State for Intelligence & Research
National Counterintelligence Center

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